No. 87-1010

In the Supreme Court of the United States

OCTOBER TERM, 1987

IDA J. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals erred in holding that the government did not waive its defense that a California statute limits petitioner's noneconomic damages in this medical malpractice case.

1. Petitioner is the wife of a serviceman who sustained permanent brain damage when his ventilator became disconnected at an Army hospital in California (Pet. App. 18-19). Petitioner sought damages under the Federal Tort Claims Act (28 U.S.C. 1346, 2671 *et seq.*) for loss of consortium and emotional distress resulting from her husband's injury. The government stipulated to liability for the incident (Pet. App. 19).

The district court awarded petitioner $400,000 for loss of consortium and $100,000 for negligent infliction of emotional distress (Pet. App. 19). The government then moved for a reduction of the damages under Cal. Civ. Code § 3333.2 (West 1970), which limits noneconomic damages to $250,000 in an action for professional negli-

gence against a health-care provider. The district court denied the motion on the ground that petitioner's claims were based on ordinary "common law" negligence rather than professional negligence (Pet. App. 19).

The court of appeals reduced the judgment to $250,000 (Pet. App. 26). The court of appeals held that petitioner's suit was an action for professional negligence because the Army hospital had a professional duty to prevent petitioner's husband from becoming disconnected from his ventilator (*id.* at 24). The court concluded, therefore, that Section 3333.2 of the California Civil Code limits petitioner's noneconomic damages to $250,000.

The court of appeals held that the government did not waive reliance on the California statute by not pleading the statute in its answer to petitioner's complaint. The court reasoned that Section 3333.2 was a limitation on liability rather than an affirmative defense that must be pleaded under Fed. R. Civ. P. 8(c) (Pet. App. 25). In addition, the court of appeals noted that petitioner was not prejudiced by the government's failure to plead the damages limit set forth in Section 3333.2 (Pet. App. 25).

2. The court of appeals' decision in this fact-specific case is correct. Moreover, the decision does not squarely conflict with any other federal decision. Thus further review is not warranted.

a. Petitioner first contends (Pet. 8-10) that the court of appeals ignored binding state precedent (*Pressler* v. *Irvine Drugs, Inc.*, 169 Cal. App. 3d 1244, 215 Cal. Rptr. 807 (1985)) in holding that the government did not waive reliance on Section 3333.2. This contention is wrong for the simple reason, stated by the court of appeals (Pet. App. 24a-25a), that, in a federal-court action, federal law governs the question whether a defense was waived by failing to comply with the pleading requirement of Fed. R. Civ. P. 8(c). See *Ingraham* v. *United States*, 808 F.2d

1075, 1079 (5th Cir. 1987); *Jakobsen* v. *Massachusetts Port Authority*, 502 F.2d 810, 813 (1st Cir. 1975).[1]

b. Petitioner next argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Ingraham* v. *United States, supra*. The court there concluded that a state statute limiting liability was an affirmative defense to be pled pursuant to Fed. R. Civ. P. 8(c) (808 F.2d at 1078), and that failure to so plead waived the defense where "unfair surprise" would otherwise result. The court noted that the plaintiffs in *Ingraham* were prejudiced by the government's failure to raise at or before trial the statutory limit on damages because, had plaintiffs been aware of it earlier, they "would have made greater efforts to prove medical damages which were not subject to the statutory limit" (*id.* at 1079). Thus the court held that the government had waived reliance on the statute. At the same time, however, the court made clear that such a failure to plead a limitation of liability would not necessarily result in its waiver where no prejudice resulted (*ibid.*, citing *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986)).[2]

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[1] In any event, the issue whether Section 3333.2 *must* be pleaded as an affirmative defense was not presented in *Pressler*. In *Pressler*, the defendant did plead the statutory provision as an affirmative defense and the California appellate court simply noted this fact in its description of the case's procedural history (169 Cal. App. 3d at 1247, 215 Cal. Rptr. at 808).

[2] Petitioner relies as well (Pet. 13) on *Jakobsen* v. *Massachusetts Port Authority*, 520 F.2d 810 (1st Cir. 1975). In that case, the court also concluded that a statutory limitation on liability should have been pled as an affirmative defense, and found the defense waived on the particular facts before it. At the same time, however, the court made clear its view (*id.* at 813) that "[d]oubtless, when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed."

In this case, the court of appeals noted (Pet. App. 22-23) that Section 3333.2 defines "professional negligence" broadly as "a negligent act or omission to act by a health care provider in the rendering of professional services." In light of the sweeping scope of this definition, the court concluded that petitioner's husband's "injuries unquestionably arose from professional negligence" (Pet. App. 25). This is true regardless of how the ventilator became disconnected (*id.* at 24).[3] Accordingly, the court correctly reasoned (*id.* at 25) that application of Section 3333.2 to this case required resolution of no factual issues and, unlike the situation in *Ingraham*, petitioner was not prejudiced by the government's delay in raising the statutory limitation.

There is admittedly an inconsistency between the opinions in this case and *Ingraham* as to whether statutes limiting damages in malpractice cases are an affirmative defense under Rule 8(c). Compare Pet. App. 25 with 808 F.2d at 1079. This difference, however, does not constitute a conflict in the holdings of the two courts. On the contrary, they applied the same test to decide whether the government waived reliance of the statutory limits—*i.e.*, whether the plaintiff was prejudiced. Thus we believe that this case does not present an issue calling for resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[3] The court's holding that Section 3333.2 applies in this case is a matter of state law not warranting review by this Court.

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